No. 91-872

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTHONY SALERNO, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICUS CURIAE NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

PAGE

Table of Authorities ii

Interest of the Amicus Curiae 1

Summary of Argument 2

Argument:

Point I The Admission of Otherwise Unavailable, Post-Indictment Exculpatory Testimony Disclosed under Immunity in the Grand Jury Is Compelled by the Historic Purpose of the Grand Jury 3

Point II The Court of Appeals Properly Construed the "Similar Motive" Requirement of Rule 804(b)(1) So As to Avoid Interfering with the Defendants' Right to a Fair Trial 9

Conclusion 13

TABLE OF AUTHORITIES

Cases PAGE

Beavers v. Henkel, 194 U.S. 73 (1903) 6

Blair v. United States, 250 U.S. 273 (1919) 5

Brady v. Maryland, 373 U.S. 83 (1963) 9, 10

Butterworth v. Smith, 494 U.S. 624 (1990) 7

Chambers v. Mississippi, 410 U.S. 284 (1973) . . . 10, 12

Costello v. United States, 350 U.S. 359 (1956) 5

Crane v. Kentucky, 476 U.S. 683 (1986) 10, 11, 12

Fallen v. United States, 378 U.S. 139 (1964) 9

In re Groban, 352 U.S. 330 (1957) 4

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 5

Rock v. Arkansas, 483 U.S. 44 (1987) 11

Taylor v. Illinois, 108 S. Ct. 646 (1988) 11, 13

United States v. Calandra, 414 U.S. 338 (1973) 5

United States v. Cronic, 466 U.S. 648 (1984) 12

United States v. Dionisio, 410 U.S. 1 (1973) 7

United States v. Mandujano, 425 U.S. 564 (1976) . . . 5

Cases PAGE

United States v. Mechanik, 475 U.S. 66 (1986) 5

United States v. Nixon, 418 U.S. 683 (1974) 12

United States v. Procter & Gamble Co., 356 U.S. 677 (1958) 7

United States v. Remington, 208 F.2d 567 (2d Cir. 1953), cert. denied, 347 U.S. 913 (1954) 4

Washington v. Texas, 388 U.S. 14 (1967) 11

Constitutional Provisions

Amendment V 2, 6, 7

Amendment VI 5, 10

Rules

Fed. R. Crim. P. 6(d) 7

Fed. R. Evid. 102 9

Fed. R. Evid. 804(b)(1) 2, 3, 9, 10

PAGE

Miscellaneous

BOUDIN, "The Federal Grand Jury", 61 Georgetown L. Rev. 1 (1972) 5

Federal Rules of Evidence Manual, Rule 607 (5th ed. 1990) 5

M. Frankel & G. Naftalis, *The Grand Jury* (1975) 4

J. WEINSTEIN, EVIDENCE ¶ 102[01] (1991) 9

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BRIEF OF AMICUS CURIAE NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The New York Council of Defense Lawyers (NYCDL) consists of prominent members of the New York criminal defense bar who practice in the federal courts on a regular basis. NYCDL attempts to address on an institutional level the problems confronting the criminal defense bar in the Southern and Eastern Districts of New York. In fulfilling that role, it has appeared as *amicus curiae*, at both the appellate and trial court levels, in numerous federal cases that have posed critical issues for the criminal defense bar.

This case raises fundamental questions about whether the oversight role of the grand jury and the truth-seeking role of the trial process are both to be subordinated to the government's tactical advantages such as to effectively suppress critical exculpatory evidence and undermine an individual's constitutional right to a fair trial. As such, this case raises issues of broad importance not only to criminal defense lawyers but to the achievement of fair and effective processes for the attainment of truth.

SUMMARY OF ARGUMENT

The Federal Rules of Evidence govern the admissibility of widely varying sources of proof. This broad coverage demands that the Rules be interpreted liberally and flexibly, as the Rules themselves provide. This case involves the application of the former testimony exception to the hearsay rule, Fed. R. Evid. 804(b)(1), but also implicates the proper functioning of the grand jury and the availability to the defense of sworn, exculpatory testimony.

The Second Circuit Court of Appeals concluded that the "similar motive" requirement of Rule 804(b)(1) did not prevent a criminal defendant from presenting at trial the immunized grand jury testimony of two witnesses where (1) the testimony directly rebutted a central allegation of the indictment, and (2) the witnesses were unavailable to the defendants because they invoked their Fifth Amendment privilege. As we show below, two broad arguments support the Court of Appeals' decision.

First, the grand jury was developed to shield the individual citizen against the government. That goal of the institution would be perverted if the government, having enabled the grand jury to obtain critical testimony through its power to immunize a reluctant grand jury witness, could retain unilateral power to make that testimony unavailable to the criminal

defendant at trial despite its highly exculpatory nature. Instead, in view of the overwhelming advantages normally enjoyed by the government in the grand jury -- e.g., the *ex parte* presentation of evidence and the relaxation of the rules of evidence -- allowing the defendant to make use of such crucial exculpatory testimony as still emerges before the grand jury helps to restore some of the historic balance.

Second, this Court has held that rigid adherence to the hearsay rule may operate to deprive a defendant of his or her constitutional right to a fair trial. The Court of Appeals recognized that exclusion of the grand jury testimony at this trial would raise serious due process concerns. Accordingly, the court properly construed Rule 804(b)(1) in a manner that avoided the constitutional question and guaranteed adversarial fairness, a guiding principle for all evidentiary rulings.

POINT I

THE ADMISSION OF OTHERWISE UNAVAILABLE, POST-INDICTMENT EXCULPATORY TESTIMONY DISCLOSED UNDER IMMUNITY IN THE GRAND JURY IS COMPELLED BY THE HISTORIC PURPOSE OF THE GRAND JURY

In light of the grand jury's historic role as a bulwark against prosecutorial overreaching, grand jury testimony elicited by the prosecutor through a grant of immunity should be admitted at a subsequent trial under the "former testimony" exception to the hearsay rule, Fed. R. Evid. 804(b)(1). The Court of Appeals was therefore correct in ruling that its exclusion by the district court was an abuse of discretion.

The government's basic contention that exculpatory grand jury testimony should never be admitted at trial under Rule 804(b)(1) is effectively an argument that the decisions made by

the United States Attorney in assisting the grand jury to ascertain the evidence relevant to a determination of probable cause should have absolutely no impact -- under any circumstances -- on the availability of otherwise unobtainable exculpatory evidence at the subsequent trial. This ignores the grand jury's historic role as a shield against government overreaching. The United States Attorney should not be permitted, as he did here, to misappropriate the grand jury process as an *ex parte* trial tactic.

The courts have long recognized that the grand jury, with its broad investigatory powers, may become an instrument of oppression in the wrong hands. M. FRANKEL & G. NAFTALIS, THE GRAND JURY at 52-53 (1975). "Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power." *In re Groban*, 352 U.S. 330, 352-53 (1957) (Black, J. dissenting). "Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination." *United States v. Remington*, 208 F.2d 567, 573 (2d Cir. 1953) (Hand, J.), *cert denied*, 347 U.S. 913 (1954).

To facilitate its inquiry, the grand jury has an almost unlimited power to subpoena witnesses and documentary evidence.

> It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

Blair v. United States, 250 U.S. 273, 282 (1919). Thus, the grand jury's powers of inquiry are not subject to limitations (evidentiary, constitutional, and otherwise) imposed on other tribunals. For example, the grand jury's "operation is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *United States v. Calandra*, 414 U.S. 338, 343 (1973). Hearsay or otherwise inadmissible evidence can serve as the basis of the decision to indict, *Costello v. United States*, 350 U.S. 359 (1956).

Likewise, no judge presides over the proceedings to monitor the interrogation of witnesses. Furthermore, witnesses, many of whom are at grave risk of incrimination, are unprotected by the Sixth Amendment right to counsel. *United States v. Mandujano*, 425 U.S. 564, 581 (1976). Even retained counsel are excluded from the grand juryroom. "Our society has no comparable institution which sanctions such interrogations of a person 'legally' denied counsel." BOUDIN, "The Federal Grand Jury", 61 Georgetown L. Rev. 1, 3 (1972).

Prosecutors are accorded a great deal of leeway in presenting their cases to grand juries. *United States v. Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor J. concurring). They are not required to present exculpatory evidence that might undermine their case for indictment. *E.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). "When one realizes that defense counsel is not present before the grand jury, that the normal evidence rules do not apply (meaning that leading questions can be asked), and that the grand jury can be an intimidating body, the power of government to create admissible substantive evidence is readily appreciated." Federal Rules of Evidence Manual, Rule 607 at 566-67 (5th ed. 1990). Nevertheless, prosecutorial conduct in the grand jury is accorded great deference. *See, e.g., Mechanik*, 475 U.S. at 73.

It is therefore the duty of trial courts to prevent the government from unfairly benefitting from its unilateral access to these overwhelming investigatory resources. Thus, when "the traditional role of the grand jury as the arbiter of government prosecution has been eroded . . . to a status as merely another weapon in the government's fact-finding arsenal," 61 Georgetown L. Rev. at 1; *see Beavers v. Henkel,* 3 194 U.S. 73, 84 (1903), trial courts should construe the federal rules of evidence to prevent the United States Attorney from suppressing the otherwise unavailable exculpatory fruits of his investigatory efforts.

In the case below, the United States Attorney used the broad investigatory might of the grand jury for many months to obtain the subject indictments. As noted in the respondents' brief, DiMatteis and Bruno were called to testify in the grand jury after the initial indictment in *Salerno II* had been returned. Not surprisingly, the witnesses asserted their Fifth Amendment privileges, and the United States Attorney, utilizing his exclusive immunity powers, chose to compel their testimony. The *ex parte* cross-examinations thus ensued in the absence of judicial supervision or defense counsel, and the government thereby "created" the evidence at issue.[1]

Inevitably, DiMatteis and Bruno asserted their Fifth Amendment privileges at trial, and the prosecutor, presented with the more formidable burden of proof in that forum, sought to deprive the defendants of this highly relevant exculpatory evidence by refusing to grant the witnesses identical use immunity for the testimony previously disclosed. The United States Attorney thereby sought to treat the grand jury, and the

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[1] The credibility of this testimony is a question exclusively reserved for triers-of-fact and is therefore irrelevant to this analysis. However, the fact that the excluded testimony directly undermines the government's case evidences the harmfulness of the trial court's error.

evidence it had obtained, as simply instruments of his office, usable or not as his trial tactics dictated. Thus, his attempt to suppress any use at trial of the otherwise unavailable exculpatory evidence would, if upheld, effectively undermine the grand jury's historic function.

Moreover, the government's reliance on the grand jury secrecy provisions of Fed. R. Crim. P. 6(d) is misplaced (Petitioner's Brief at 11-13). Grand jury proceedings are conducted in secret (1) to prevent potential targets from escaping, (2) to preserve the grand jury's independence, (3) to prevent perjury of witnesses, and (4) to protect the innocent who never get indicted. *United States v. Procter & Gamble Co.,* 356 U.S. 677, 681 n.6 (1958). Even the case relied on by the government, *Butterworth v. Smith,* 494 U.S. 624 (1990) (citing *United States v. Dionisio,* 410 U.S. 1, 11 (1973)), acknowledges that grand jury secrecy is not "a talisman that dissolves all constitutional protection." In fact, none of the traditional bases for grand jury secrecy is implicated in this case.

The admission of DiMatteis' and Bruno's exculpatory grand jury testimony posed no risk of flight. By the time these witnesses were called to testify in the grand jury, all the key participants and issues had been publicly disclosed by the government in two indictments, one of which had already precipitated pre-trial proceedings. DiMatteis and Bruno themselves were listed on numerous public documents as principals in Cedar Park and related entities. In addition, the grand jury had already determined that there was sufficient probable cause to indict. DiMatteis and Bruno were called to testify at trial by the defense, whereupon they asserted their Fifth Amendment privileges; accordingly, their identities as participants were publicly exposed.

Nor did the admission of grand jury testimony under these circumstances implicate perjury concerns. Because DiMatteis and Bruno's testimony denied the existence of the unlawful "Club" on which this RICO prosecution was premised, the prosecutor needed to discredit their testimony to the satisfaction of the grand jury. The United States Attorney thus extensively examined both of these witnesses in the grand jury, using electronic surveillance to impeach their testimony.[2] He had the option of calling the witnesses back to the grand jury at a later time to further impeach them, but he chose to forego that option, apparently satisfied that he had already covered all potential avenues of cross-examination. Finally, if the prosecutor wanted to preserve an action for perjury against these witnesses on the basis of their grand jury testimony, his incentive in the grand jury should similarly have been to tie the witnesses to that testimony.

For the foregoing reasons, the admission under Rule 804(b)(1) of otherwise unavailable, post-indictment exculpatory testimony disclosed under immunity in the grand jury is compelled by the constitutional purpose of the grand jury.

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[2] There is no risk of exposure of undercover surveillance when witnesses testify after the indictment has been returned. The electronic surveillance used in the investigations herein was turned over to the defense upon indictment as mandated by law.

POINT II

THE COURT OF APPEALS PROPERLY CONSTRUED THE "SIMILAR MOTIVE" REQUIREMENT OF RULE 804(b)(1) SO AS TO AVOID INTERFERING WITH THE DEFENDANTS' RIGHT TO A FAIR TRIAL

As the government acknowledges, "federal courts have substantial authority to determine how the specific provisions of the Rules apply to specific cases." (Petitioner's Brief at 16.) This authority was properly exercised in this case.

Federal Rule of Evidence 102 provides:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

"By emphasizing abstract goals, Rule 102 indicates that meeting these objectives is of greater significance than determinations of technical impeccability." J. WEINSTEIN, EVIDENCE ¶ 102[01] at 102-6 (1991). Like the federal rules of criminal and civil procedure, the Federal Rules of Evidence "are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." *Fallen v. United States*, 378 U.S. 139, 142 (1964).

In this case, the Court of Appeals construed the "former testimony" exception of Rule 804(b)(1) in light of a particularly important goal -- avoiding infringement of defendants' due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). The court found it "troubling" that the prosecution, having identified Bruno and DeMatteis as exculpatory witnesses,

resisted the admission of their grand jury testimony. (App. at 807). Indeed, the court declared that it would be a "semantic somersault" to say that the due process principles articulated in *Brady* were satisfied despite the exclusion of the exculpatory testimony.

The Second Circuit concluded that a proper construction of Rule 804(b)(1) protected these due process rights. In the court's words, "we rest our decision on our interpretation and application of Fed. R. Evid. 804(b)(1), and not on *Brady*, keeping in mind the time-honored rule that we should not reach constitutional issues unless absolutely necessary." (App. at 807). What the government characterizes as a decision "simply to disregard controlling provisions of the Federal Rules of Evidence" (Petitioner's Brief at 17) is more accurately described as the recognition that the "similar motive" requirement in Rule 804(b)(1) cannot be read in such a way as to defeat a criminal defendant's right to present reliable, exculpatory testimony elicited before the grand jury.

The Second Circuit's references to *Brady* are an invocation of the well-established right of a criminal defendant to present his or her defense. "Whether rooted directly in the Due Process Clause . . . , or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations omitted).

This Constitutional right cannot be frustrated by rigid adherence to a rule of evidence. In *Chambers v. Mississippi*, 410 U.S. 284 (1973), Chambers, on trial for murder, sought to call three witnesses who would testify that another person had admitted to them his commission of the crime. The state courts excluded this testimony as hearsay. This Court reversed, holding that "where constitutional rights directly affecting the

ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Id. at 302.

Similarly, in *Washington v. Texas*, 388 U.S. 14 (1967), a state statute prohibited Washington from calling as a witness a person charged as a co-participant in the crime. The Court concluded that Washington was "denied his right to have compulsory process of witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Id.* at 23.

This Court's more recent cases have also consistently reaffirmed the protection of a criminal defendant's right to present the testimony of crucial defense witnesses. *See, e.g., Taylor v. Illinois*, 108 S. Ct. 646, 653 (1988) ("We cannot accept the State's argument that this constitutional right [to present evidence] may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness"); *Rock v. Arkansas*, 483 U.S. 44 (1987) (state's *per se* rule excluding hypnotically refreshed testimony impermissibly infringes on defendant's right to testify); *Crane*, 476 U.S. at 688-91 (state may not exclude all evidence regarding circumstances surrounding defendant's confession).

In light of its concern with the defendants' right to present their defense, the Second Circuit's reliance on principles of adversarial fairness was particularly appropriate. Recognizing that the "similar motive" requirement was designed to protect the right to cross-examination, the court refused to "countenance the exclusion of [the] grand jury testimony on the ground of purported fairness to the government," which had developed the exculpatory testimony in the grand jury and

unilaterally possessed the power to compel that testimony at trial.

In other words, a narrow or non-functional construction of the "similar motive" requirement would present an obstacle to the admission of critical exculpatory testimony without serving the purpose of protecting the government's adversarial interests. "In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Crane*, 476 U.S. at 690-91 (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984).

Properly understood, rules of evidence provide a framework in which the central goals of the adversary system are realized.

> Few rights are more fundamental than that of an accused to present witnesses in his own defense, see, *e.g.*, *Chambers v.Mississippi*, 410 U.S. 284 (1973). Indeed this right is an essential right of the adversary system itself.
>
> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. *United States v. Nixon*, 418 U.S. 683 (1974).

Taylor, 108 S. Ct. at 652.

Under the circumstances here, an element of a hearsay exception, although intended to further adversarial interests, would actually operate to frustrate the adversary process if construed too narrowly. The Court of Appeals properly concluded that the "similar motive" requirement must be construed to be consistent with this higher goal.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit Court of Appeals should be affirmed.

Dated: New York, New York
April 6, 1992

Respectfully submitted,

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